Office-Supreme Court, U.S.
FILED
JUL 10 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1429

In the Supreme Court of the United States

October Term, 1980

DUANE YOUNGBERG, Individually and in His Official Capacity as Superintendent, Pennhurst State School and Hospital, and RICHARD MATTHEWS, Individually and in His Official Capacity as Director of Resident Life, Pennhurst State School and Hospital, and MARGUERITE CONLEY, Individually and in Her Official Capacity as Unit Director, Unit 9, Pennhurst State School and Hospital,
Petitioners

v.

NICHOLAS ROMEO, an Incompetent, by His Mother and Next Friend, PAULA ROMEO,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

DAVID H. ALLSHOUSE
Deputy Attorney General
ROBERT B. HOFFMAN
Deputy Attorney General
ALLEN C. WARSHAW
Deputy Attorney General
Chief, Civil Litigation
LEROY S. ZIMMERMAN
Attorney General
Office of Attorney General
1641 Strawberry Square
Harrisburg, PA 17120
(717) 783-1471
Counsel for Petitioners

EDMOND A. TIRYAK
Community Legal Services, Inc.
Developmentally Disabled Advocacy Project
Law Center North Central
3638 N. Broad Street
Philadelphia, PA 19104
(215) 227-2400
Counsel for Respondent

Petition for Certiorari Filed February 23, 1981
Certiorari Granted May 18, 1981

TABLE OF CONTENTS

	PAGE
JOINT APPENDIX:	
Relevant Docket Entries (District Court)	1a
Relevant Docket Entries (Court of Appeals)	4a
Second Amended Complaint .....Pet. App.	86a*
Defendants' Second Amended Answer to Plaintiff's Second Amended Complaint	6a
Memorandum Opinion, District Court (Motion To Dismiss) .....Pet. App.	85a
Order, District Court (Motion to Dismiss) Pet. App.	85a
Excerpts of Testimony (Offers of Proof and Rulings on Plaintiff's Expert Witnesses) .....Pet. App.	97a
Plaintiff's Exhibit No. 16 (Letter, April 21, 1976)	13a
Plaintiff's Exhibit No. 17 (Letter, October 22, 1976)	15a
Defendants' Exhibit No. 4 (Petition for Commitment of Nicholas Romeo)	17a
Defendants' Exhibit No. 6 (Order for Commitment of Nicholas Romeo)	33a
Plaintiff's Proposed Jury Instructions (Excerpts) Pet. App.	93a
Defendants' Requested Jury Instructions	35a
Court's Ruling on Points for Charge	44a

* "Pet. App." page references are to pages of the appendix to the petition for writ of certiorari. Pursuant to Rule 30.1 of the Court, these materials have not been reproduced again.

Charge to the Jury 63a
Judgment Order 83a
Opinion, Court of Appeals .....Pet. App. 1a
Concurring Opinion .....Pet. App. 48a

JOINT APPENDIX

I.

RELEVANT DOCKET ENTRIES (DISTRICT COURT)

1976

Nov. 4 Complaint filed.

Nov. 4 Jury trial demand, filed.

* * *

1977

Jan. 17 Defts'. motion to dismiss, notice of motion and certification of service, filed.

* * *

Jan. 25 Amended complaint, filed.

Feb. 16 Defts'. motion to dismiss amended complaint, filed.

* * *

June 7 Memorand re: Motion to dismiss, McGlynn, J., filed. entr. & cys. mailed 6/8/77

June 7 Order dtd. 6/6/77 that defts'. motion to dismiss be and the same is hereby GRANTED to the extent that plff. seeks damages from them in their official capacities, and it is further order that defts' motion to dismiss in all other respects is hereby DENIED, filed. JM entr. & cys. mailed 6/8/77

June 22 Answer filed.

June 22 CASE LISTED FOR TRIAL

* * *

Oct. 18 Pretrial memorandum order to complete discovery by 12/29/77, etc and listing case of Feb. 1978 trial list, filed. JM cys. mailed 10/18/77-entr. 10/19/77

* * *

Nov. 10 Plffs motion for leave to file second amended complaint, notice, memorandum of law, filed.

Nov. 14 Defts' response to plff's motion for leave to file a second amended complaint, filed.

* * *

Dec. 8 Order dd. 12/7/77 that plff's motion for leave to amend his complaint is granted, & plff's Second Amended Complaint is deemed filed as of this date. It is further Ordered that defts shall answer plff's Second Amended Complaint within 20 days, filed. (12/9/77 entered & copies mailed.)

Dec. 8 Plff's Second Amended Complaint, filed.

* * *

Dec. 30 Defts' Youngberg, Matthews and Conley answers to plff's second amended complaint, filed.

* * *

1978

Feb. 9 Plff's motion for preliminary injunction, Memorandum of Law & Notice filed.

* * *

Feb. 10 Defts' response to plff's motion for a preliminary injunction, filed.

* * *

Apr. 17 Defts' motion for leave to file an amended answer & Certificate, filed.

* * *

Apr. 21 JURORS Called & Sworn, Trial on 4/17/78, Plffs' witnesses-sworn, filed.

* * *

Apr. 24 Defts' 2nd amended answer to plff's 2nd amended complaint, filed.

* * *

Apr. 27 Defts' motion for directed verdict pursuant to F.R.C.P. 50, filed.

Apr. 27 Trial resumes on 4/26/78; The Court charges the jury; Verdict—in favor of all defts', filed.

* * *

Apr. 27 Order dated 4/26/78 that judgment is entered in favor of Defts' and against plffs', filed. 4/28/78 entered & copies mailed. JM/Clk

* * *

May 25 Plff's notice of appeal received 5/25/78 at 4:00 PM, filed. 5/26/78 entered & copies mailed to McGuire; Frank, Margolis, Edelstein & Scherlis.

May 25 Copy of Clerk's notice to USCA, filed.

* * *

June 31 Certified copy of Order received from the U.S.C.A. that appellant's motion to proceed on appeal in forma pauperis etc. is GRANTED, filed.

II.

RELEVANT DOCKET ENTRIES (COURT OF APPEALS)

1978

July 28 Order (*Adams*, Weis and Higginbotham, C.J.) granting appellant's motion for leave to proceed in forma pauperis, filed.

* * *

July 28 Order (Acting Clerk) directing that the appeal be docketed and the record filed out of time, as of the date of this order, filed.

* * *

Sept. 6 Brief for appellants, filed. (4 cc.)

* * *

Oct. 10 Brief for appellees, filed. (25 cc.). Certificate of service by hand delivery on October 10, 1978 appears on last page of brief.

* * *

1979

Jan. 2 Order dated December 29, 1978 (Seitz, Ch.J.) directing 20 minutes argument time for each side, filed.

Jan. 9 Argued. Coram: Seitz, Ch.J., Gibbons and Higginbotham, C.J.

Dec. 21 Order (*Seitz*, Ch.J., Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis, Garth, Higginbotham & Sloviter, C.J.) directing that the Clerk of this Court list

this case for rehearing before the court in banc at the convenience of the Court filed.

1980

April 21 Clerk's letter to counsel, written at the direction of the Court, requesting counsel be prepared to address at oral argument the question, *inter alia,* whether Mr. Romeo was involuntarily committed., etc. (see letter for rest of the question).

March 11 Order (Seitz, Ch.J.) directing 15 minutes reargument time for each side, filed.

April 28 Reargued. Coram: Seitz, Ch.J., Aldisert, Adams, Gibbons, Rosenn,Weis, Garth, Higginbotham & Sloviter, C.J.

Nov. 24 Opinion of the Court (Seitz, Ch.J.), Aldisert, *Adams,* Gibbons, Rosenn, Weis, Garth Higginbotham & Sloviter, C.J.), together with separate concurring opinion by Chief Judge Seitz, with whom Judges Aldisert, Rosenn & Garth join, and separate concurring opinion by Judge Aldisert, with whom Judge Garth joins; and separate concurring opinion by Judge Garth, with whom Judge Aldisert joins, filed.

Nov. 24 Judgment on rehearing vacating the judgment of the District Court, entered April 28, 1978; and remanding the cause for a new trial in accordance with the opinion of this Court, filed.

Dec. 16 Certified judgment in lieu of formal mandate issued.

* * *

Dec. 12 Order (Seitz, Ch.J., Aldisert, Adams, Gibbons, Rosenn, Weis, Garth, Higginbotham & Sloviter, C.J.) amending the opinion, filed.

III.

SECOND AMENDED ANSWER

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-3429

NICHOLAS ROMEO, an incompetent, by his mother and next friend, PAULA ROMEO,

Plaintiff

vs.

DUANE YOUNGBERG, individually and in his official capacity as Superintendent, Pennhurst State School and Hospital,

and

RICHARD MATTHEW, individually and in his official capacity as Director of Resident Life, Pennhurst State School and Hospital,

and

MARGUERITE CONLEY, individually and in her official capacity as Unit Director, Unit 9, Pennhurst State School and Hospital,

Defendants

DEFENDANTS' SECOND AMENDED ANSWER TO PLAINTIFF'S SECOND AMENDED COMPLAINT

FIRST DEFENSE

Defendants Youngberg, Matthew and Conley answer plaintiff's Second Amended Complaint as follows:

1. Paragraph 1 is admitted only insofar as it purports to characterize the form of this action. All factual allegations are denied.

2. Paragraph 2 consists of a legal conclusion to which no response is required. To the extent that it is deemed to contain factual allegations, they are denied.

3. Admitted.

4. Paragraph 4 is admitted except insofar that it is denied that defendant Youngberg is responsible for the acts or omissions of any person employed at Pennhurst.

5. Paragraph 5 is admitted to the extent that Richard Matthew is the Director of resident life at Pennhurst. It is denied to the extent that it alleges that he has day-to-day responsibility for the health and welfare of patients or residents allegedly incarcerated at Pennhurst and to the extent that it alleges that Nicholas Romeo was at any time or is now incarcerated at Pennhurst.

6. Paragraph 6 is admitted to the extent that it alleges that defendant Conley is the Unit Director of Unit 9 at Pennhurst. All other allegations of this paragraph are denied including any allegations that Nicholas Romeo was at any time or is now confined in Unit 9 at Pennhurst.

7. Paragraph 7 is admitted.

8. Paragraph 8 is admitted except that it is denied that defendants have held or are now holding plaintiff in Pennhurst against his will.

9. After reasonable investigation, defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 9. Strict proof of these averments are demanded at trial.

10. Paragraph ten is denied insofar as it alleges that as a result of attacks on him by third persons, the plaintiff suffered a permanently deformed finger, a broken bone or bones, hepatitis or boils. With respect to other injuries alleged in paragraph 9, defendants are without knowledge or information sufficient to form a belief as to the truth of this paragraph or that such injuries were caused by attacks on plaintiff by third persons. Strict proof of these averments is demanded at trial.

11. Denied.

12. Denied.

13. Denied. It is denied that defendants refused to provide plaintiff with such care and attention as would reasonably prevent him from incurring attacks and beatings. It is further denied that plaintiff suffered or was injured by alleged attacks and beatings. It is further denied that defendants' conduct constituted an unconstitutional deprivation of plaintiff's rights as secured by the Eighth and Fourteenth Amendments of the United States Constitution.

14-19. Paragraphs 14 through 19 are specifically denied.

20. Paragraph 20 is denied insofar as it alleges that defendants caused plaintiff to be transferred to the medical-

surgical building at Pennhurst subsequent to the filing of plaintiff's Complaint in this case.

21. Denied.

22. Admitted.

23-24. Paragraph 23 and 24 are specifically denied.

25. Paragraph 25 consists of a legal conclusion to which no response is required. To the extent that it is deemed to contain factual allegations, they are specifically denied.

26. Insofar as this paragraph alleges that Woodhaven Center has appropriate vacancies and could provide plaintiff with treatment and program, it is specifically denied. To the extent that the availability of such treatments or programs is alleged in other unnamed and unspecified state facilities, defendants are without knowledge or information after reasonable investigation sufficient to form a belief as to the truth of the averments of this paragraph. Strict proof thereof is demanded at the time of trial.

27. Paragraph 27 is denied.

28. Paragraph 28 is denied. It is further denied that Pennhurst employees or other unidentified or unnamed mental retardation professionals have made recommendations and/or requests that defendants seek plaintiff's transfer to another state facility.

29. Paragraph 29 consists of a legal conclusion to which no response is required. To the extent that this paragraph is deemed to contain factual allegations, they are specifically denied.

30. Paragraph 30 is denied. It is further denied that defendants have unconstitutionaly deprived plaintiff of any rights. To the extent that this paragraph alleges the existence of a right to transfer to another State institution or to the extent that it alleges that defendants owe plaintiffs the duty to seek such a transfer, this paragraph consists of a legal conclusion to which no response is required. To the extent such allegations of the existence of such a duty are deemed to be factual, the existence of such duty is denied.

31. Denied.

SECOND DEFENSE

32. This action is barred by that Statute of Limitations.

THIRD DEFENSE

33. The Second Amended Complaint fails to state a claim upon which relief can be granted.

FOURTH DEFENSE

34. At all times relevant to this action, defendants acted in their official capacities and the doctrine of official immunity bars this action.

FIFTH DEFENSE

35. At all times relevant to this action, defendants acted in good faith and reasonably, in light of all the circumstances, according to state and federal law, and at no time knew or should have known that their actions or alleged omissions to act may have violated any right of plaintiff. Nor have defendants acted with the malicious

intent to violate plaintiff's rights or to injure him in any way. Accordingly, defendants are entitled to immunity from damages.

SIXTH DEFENSE

36. Plaintiff's representative Paul Romeo has refused to allow defendants to adopt measures which, in their professional judgment, would have substantially improved Nicholas Romeo's physical safety.

SEVENTH DEFENSE

37. Defendants' alleged failure to adopt such policies and procedures as would have been required to assure plaintiff a reasonable degree of physical safety was neither intentional, knowing or malicious.

EIGHTH DEFENSE

38. At all times relevant to this action, defendants have provided for the reasonable physical safety of plaintiff Nicholas Romeo.

NINTH DEFENSE

39. This action is barred by the final judgment in *Halderman v. Pennhurst,* Civil Action No. 74-1345 (E.D. Pa. opinion filed December 23, 1977), as between plaintiff Nicholas Romeo, a member of the plaintiff class therein, and defendant C. Duane Youngberg and those in privity with him.

TENTH DEFENSE

40. This action is barred by the Eleventh Amendment of the United States Constitution.

ELEVENTH DEFENSE

41. This Court lacks jurisdiction over this action.

TWELFTH DEFENSE

42. At no time relevant to this litigation has plaintiff Nicholas Romeo or his representative ever requested nor have defendants at any time refused to release Nicholas Romeo from Pennhurst or from any part of Pennhurst or to transfer him to any specifically designated ward at Pennhurst.

THIRTEENTH DEFENSE

43. Plaintiff Nicholas Romeo has at no time relevant to this litigation been confined by defendants against his will, nor have defendants opposed his release from Pennhurst.

FOURTEENTH DEFENSE

44. This suit is barred by reason of laches. Plaintiff is estopped to allege that the alleged acts or omissions of defendants constitute or constituted an infringement of plaintiff's alleged rights.

Joseph W. McGuire
Deputy Attorney General
J. Justin Blewitt, Jr.,
Deputy Attorney General, Chief, Civil Litigation
Robert P. Kane,
Attorney General
Frank, Margolis, Edelstein & Scherlis

By: Jonathan Wheeler

IV.

EXHIBITS

PLAINTIFF'S EXHIBIT NO. 16

PENNSYLVANIA HOSPITAL

Department
for Sick and Injured

The Nation's First Hospital—Founded 1751
Eighth and Spruce Streets

Philadelphia, Pa. 19107
Telephone 215—829-5281

April 21, 1976

C. Duane Youngberg, Ed. D.
Superintendent
Pennhurst State School and Hospital
Spring City, Pa. 19475

Re: Nicholas Romeo

Unit IX

Dear Superintendent Youngberg:

Mrs. Paula Romeo has expressed serious concern to us regarding an incident involving her son, Nicholas, which occurred on March 20, 1976. Mrs. Romeo received a letter from Dr. Bewint on March 22nd informing her that Nicholas had incurred a "laceration of his left fifth finger"

and had been admitted to the hospital. She found out later, after repeated phone calls, that his finger was not only lacerated but fractured as well. She is concerned both about the fact that the incident occurred and the discrepancy in the information she received. She also feels that there is insufficient staff to adequately supervise the patients on that ward.

This is the second time we are writing to express our serious concern, as well as Mrs. Romeo's, about the health and welfare of Nicholas. (You will find a copy of the December 5, 1975 letter enclosed). We are requesting, on Mrs. Romeo's behalf, a report from you regarding the above reported incident at your earliest convenience.

Very truly yours,

Enclosure

(s) Marianne Trainer
Mrs. Marianne Trainer, MSW
Developmental Disabilities Unit
Hall Mercer CMH/MR Center

Youngberg
D-9
12-29-77

cc: Russell Rice
PARC
Mrs. Romeo
MT: dat

PLAINTIFF'S EXHIBIT NO. 17

---

1 of 26
CC: Zelt Cooper
Joan Claypoole
Joe Foster
Dick Matthew
Marge Conley
Supt File (2)

October 22, 1976

The Honorable Michael O. Myers
House of Representatives
Main Capitol Building
Harrisburg, Pennsylvania 17120

Dear Mr. Myers:

This is in response to your letter to me of September 28, 1976, concerning Mr. Nicholas Romeo, a resident of Pennhurst Center.

In response to your request we have directed Pennhurst Center to contact Mrs. Romeo to explain the procedures involved in applying for a transfer for her son and to facilitate, to the extent possible, the transfer. For your information, a transfer to Woodhaven Center is contingent upon the availability of space and upon the suitability of the programs provided at the Center.

We appreciate your continued concern for the well-being of Nicholas. If we may be of further assistance, please contact us.

Very truly yours,
Frank S. Beal

EBC:jh
cc: Secretary's Office
Mr. Coluarti
Mr. Hobbs
Dr. Rice
Dr. Youngberg
Ms. Marshall
Mr. Carskadon

DEFENDANTS' EXHIBIT NO. 4
(PETITION FOR COMMITMENT OF NICHOLAS ROMEO)

IN THE COURT OF ..... OF ..... COUNTY

..... TERM, 19 .....

..... NO. .....

PETITION FOR COMMITMENT FOR PERSON WHO IS MENTALLY DISABLED

MENTAL HEALTH AND MENTAL RETARDATION ACT OF 1966

(Sections 406, 407, 408, 410, 411 and 413)

To the Honorable the Judges of the Above Court

The Petition of (Name of Petitioner) Paula Romeo respectfully represents:

That she is the (Relationship or Title of Petitioner as Prescribed) Mother of (Name of Patient) Nicholas Romeo

TYPE OF COMMITMENT

[×] Civil Court Commitment (complete Parts I, III, IV, V, VII, IX, X, and if possible, VI)

— Commitment of person charged with crime and released on bail (Complete Parts I, III, IV, V, VII, IX)

— Commitment of person charged with crime and detained in a penal or correctional institution (Complete Parts II, III, IV, VIII, IX)

— Commitment in lieu of sentence of person adjudged guilty of crime (Complete Parts III, VII, IX)

— Commitment of person undergoing sentence and detained in penal or correctional institution (Complete Parts II, III, IV, VIII, IX)

— Commitment of person acquitted of crime because of insanity (Complete Parts I, III, IV, V, VII, IX)

Note: Part X must also be completed where applicable if patient is retarded.

PART I (UNDER PROVISIONS OF SECTIONS 406, 407 AND 413)

That your Petitioner believes that (Name of Patient) Nicholas Romeo is mentally disabled because (State Reason) "Since my husband's death (May 10'74) I am unable to handle him. He becomes violent--Kicks, punches, breaks glass; He can't speak—wants to express himself but can't. He is constant 24 hr. care. without my husband I am unable to care for him."

Check Applicable Paragraph

[×] Attached are the certificates of a physician or physicians to the effect that the patient is mentally disabled.

☐ Certificates of a physician or physicians are not attached because:

The Court upon consideration of such petition shall: Issue a warrant requiring that such person be brought before the Court: Fix a date for hearing which shall be as soon as the warrant is executed, and notify the parties in interest. Wherefore Section 406(4) of the Mental Health and Mental Retardation Act of 1966 empowers the court to order an inquiry into the patients condition.

PART II (UNDER PROVISIONS OF SECTIONS 408 AND 411)

That the Defendant, a prisoner in institution was charged or convicted of the following (Specify Charges of the Crime for which convicted)

That your Petitioner believes that the Defendant is in such condition as to make it necessary that he be cared for in a mental facility. Wherefore Section 408(s) of the Mental Health and Mental Retardation Act of 1966 empowers the court to order an inquiry into the Defendants condition.

(s) Paula Romeo
Signature of Petitioner

To Be Completed By Facility

Name of Facility Penna. Hosp.; Admission Date 5/22/74;

Case Number

PART III PERSONAL DATA

Patient's Name (Last, First, Middle): Romeo Nicholas; Maiden Name ; Aliases ; Social Security No: 173-52-0756

Address (Street, Town, State): 1136 McKean St., County Phila., BSU

Sex [×] Male,—☐ Female. Age of Admission: 26; Date of Birth, Month 1, Day 4, Year 48; Education (Enter Highest Grade Completed Inc. College & Advanced Study

Marital Status: ☐ Married, ☐ Widowed, ☐ Divorced, ☐ Separated, [×] Never Married; Occupation: None.

Income (Total Gross Annual Family Income To Nearest Thousand Dollars) $0; Number of Persons Dependent on Income: 0

Previous Psychiatric Service: ☐ None; ☐ Pa. State Mental Hosp. (24 hr. care); ☐ Private Mental Hospital; ☐ VA Hospital; ☐ Pa. State Mental Retardation Facility; ☐ Psychiatric Unit General Hosp.; ☐Other Inpatient Care; ☐ Psychiatric Day-Night Care; ☐ Private Mental Retardation Facility; ☐ Private Psychiatrist; ☐ Outpatient Clinic; ☐ Other Outpatient.

If patient recently received treatment from an above noted facility and/or physician, please enter name(s)

Name, Address and Relationship of Responsible Relative: Paula Romeo, Mother, 1136 McKean St., Phila Pa., Telephone No. H03-1181 Alternate No.

PART IV

AFFIDAVIT

This affidavit must be sworn to or affirmed before a person authorized to administer oaths.

State of
County of ss

_____ Being duly sworn/affirmed according to law doth depose and say that the facts set forth in the above application are true to the best of his knowledge and belief.

Sworn affirmed to and subscribed before me this day of A.D. 19 (s) Paula Romeo
Signature of Petitioner

I certify that the signature to the foregoing petition is genuine

(s) Wilma C. Crane

Signature of Person Administering Oath

WILMA C. CRANE

Notary Public, Philadelphia, Philadelphia Co.

My Commission Expires March 28, 1977

Sworn to and subscribed before me this 28th day of May 1974.

PART V

CERTIFICATE OF PHYSICIAN

If Patient is Mentally ill—Commitment MUST be made within thirty (30) days of the first certifying examination.

If Patient is Mentally Retarded—Commitment MUST be made within three (3) months of the first certifying examination.

Name of Patient: Nicholas Romeo, Address of Patient, 1136 McKean St., Date of Examination: 5-28-74

History of illness as given by applicant and other relevant information including report of psychologist if patient is mentally retarded (Form is attached for Report of

Psychologist): 26 year old mentally retarded man become a management problem at home approx. 10 days after his father's death. He began to strike his mother. Must be fed and requires constant care.

Physical and mental findings at time of examination: Pt. is nonverbal-restrained in bed. Recognizes examiner by rolling his eyes and banging his head against bedrail. Pt. is easily excitable and profoundly retarded.

I certify that I am licensed to practice Medicine or Osteopathy in Pennsylvania and that I have examined the patient with care and diligence within one week prior to the date of this certification in my opinion the patient is: ☐ Mentally Ill, [×] Mentally Retarded, ☐ Not Mentally Disabled.

[Signature illegible] M.D. or D.O.
Signature of Physician
Penna. Hosp.
Address of Physician

Date 5-28-74

AFFIDAVIT

This affidavit must be sworn to or affirmed before a person authorized to administer oaths.

State of
County of ss

_____ Being duly sworn/affirmed according to law doth depose and say that the facts set forth in the above application are true to the best of his knowledge and belief.

Sworn/affirmed to and subscribed before me this
day of A.D. 19 [Signature illegible]
Signature of Physician

I certify that the signature to the foregoing petition is genuine

(s) Wilma C. Crane
Signature of Person Administering Oath

Sworn to and subscribed before me this 28th day of May 1974.

WILMA C. CRANE

Notary Public, Philadelphia, Philadelphia Co.

My Commission Expires March 28, 1977.

Department of Public Welfare

PART VI

CERTIFICATE OF PHYSICIAN

If Patient is Mentally ill—Commitment MUST be made within thirty (30) days of the first certifying examination.

If Patient is Mentally Retarded—Commitment MUST be made within three (3) months of the first certifying examination.

Name of Patient Date of Examination

Address of Patient

History of illness as given by applicant and other relevant information including report of psychologist if patient is mentally retarded (Form is attached for Report of Psychologist)

_____

_____

_____

_____

_____

Physical and mental findings at time of examination

_____

_____

_____

_____

_____

I certify that I am licensed to practice medicine or osteopathy in Pennsylvania and that I have examined the patient with care and diligence within one week prior to the date of this certification

In my opinion the patient is:

☐ Mentally ill

☐ Mentally retarded

☐ Not mentally disabled

_____ M.D. or D.O.

Signature of Physician

_____

Address of Physician

Date _____

AFFIDAVIT

This affidavit must be sworn to or affirmed before a person authorized to administer oaths.

State of
County of ss

———— Being duly sworn/affirmed according to law doth depose and say that the facts set forth in the above application are true to the best of his knowledge and belief.

Sworn/affirmed to and subscribed before me this day of A.D. 19

Signature of Physician

I certify that the signature to the foregoing petition is genuine

———————

Signature of Person Administering Oath

———

ORDER FOR EXAMINATION

This day of 19 after hearing the foregoing petition for commitment of (Name of Patient) represented by (Name of Attorney) the Court directs.

PART VII (UNDER SECTIONS 405, 407, 410 AND 413)

Check applicable paragraph and attach report

☐ Examination and report by two licensed physicians

(Name of Physician)

(Name of Physician)

☐ Commitment to a facility for a period not exceeding ten days or in the case of a person convicted of a crime not to exceed 60 days.

PART VIII (UNDER SECTIONS 408 AND 411)

Check applicable paragraph

Check one or any combination of the following procedures:

☐ Examination and report by two licensed physicians

(Name of Physician)

(Name of Physician)

☐ Examination and report by a commission

(Name of Physician)

(Name of Physician)

(Name of Attorney)

☐ Commitment to a facility not exceeding 60 days for further examination at request of appointed physician under Section 408 (c).

BY THE COURT:

J.

PART IX

IN THE COURT OF ..... OF .....COUNTY
Commonwealth

vs.

.....TERM, 19

..... NO. .....

ORDER FOR COMMITMENT

This day of 19
after hearing and consideration of

(Reports, Testimony, Etc. Attached)

the court finds

(Patient's Name)

☐ Mentally ill ☐ Mentally retarded

Accordingly the court directs that

(Patient's Name)

be committed to for:

(Name of Facility)

☐ Inpatient Care

☐ Partial Hospitalization (Not applicable under Sections 408, 410 and 411)

☐ Outpatient Care (Not applicable under Sections 408, 410 and 411)

As a mentally disabled person pursuant to the provisions of Section of the Mental Health and Mental Retardation Act of 1966.

For a period not to exceed

Check applicable paragraph

☐ Sections 407 and 408 until patient has improved sufficiently to enable him to participate intelligently in his own defense

☐ Sections 410, 411 and 412 maximum sentence authorized by law

(Insert Period)

BY THE COURT

MH/MR 2-3/71

PART X

REPORT OF PSYCHOLOGIST

Patient's Name, Nicholas Romeo; Birthdate, 1-4-48, Date of Examination, 5-29-74.

Address, 1136 McKean Street.

Background Information

Maturation (Significant lag in growth and development): Since birth, development has been slow in all maturational areas. ☐ over

Social Adjustment: Social adjustment is on a low level as Nicholas is capable of responding only to the simplest environmental stimuli (his name, a smile) and interpersonal relationships. He is dependent on others for his maintenance and completion of daily tasks. ☐ over

Tests Administered

Names of Tests and Results: Vineland Social Maturity Scale completed by Ms. Romeo. Formal testing was impossible as Nicholas was in restraints. Social maturity is approximately at a two year old level. He is able to walk steps, get a drink. However, the patient has no feeding, dressing, or washing skills.

Diagnosis (AAMD Classification): 314.2 Profound Mental Retardation due to Phenylketonuria.

Record the person's level of development for each of the following:

Attribute	Severely Sub-Average	Moderately Sub-Average	Mildly Sub-Average	Average	Above Average
1. Self-Help Skills	X				
2. Attentional Development	X				
3. Perceptual Functioning	X				
4. Psychomotor Functioning		X			
5. Communication Skills	X				
6. Concrete Cognitive Functioning	X				
7. Abstract Cognitive Functioning	X				
8. Vocational Functioning	X				
9. Personality Integration	X				☐ over

[Notarial Seal]

Adrienne Warner Med.
Psychologist

Hall-Mercer CMH/MR Center

Address or Agency

Defendants' Exhibit No. 4

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY

June Term, 1974

No. 1027

IN RE: NICHOLAS ROMEO

ORDER FOR INTERIM COMMITMENT

This 11th Day of June 1974 Upon Consideration of Dr. Richard Limoges—Adrienne Warner, The MASTER Finds NICHOLAS ROMEO

☐ MENTALLY ILL

[×] MENTALLY RETARDED

Accordingly The MASTER Directs That NICHOLAS ROMEO Be Committed To Pennhurst State School & Hospital

FOR:

[×] INPATIENT CARE

☐ PARTIAL HOSPITALIZATION (Not applicable under Sections 408, 410 and 411)

☐ OUTPATIENT CARE (Not applicable under Sections 408, 410 and 411)

☐ EXAMINATION AND EVALUATION—RESCHEDULE ———————

AS A MENTALLY DISABLED PERSON FOR A PERIOD NOT TO EXCEED ——— PURSUANT TO THE PROVISIONS OF SECTION 406 OF THE MENTAL HEALTH AND MENTAL RETARDATION ACT OF 1966.

BY THE MASTER
(s) C. C. Barrie

This Interim Order for Commitment to be confirmed by an ORDER executed by the COURT within forty-eight (48) 96 Hours.

NO OBJECTIONS:

_____

Attorney for Respondent

_____

10,434
[Illegible Notation]

PART IX

9

THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY
June Term, 1974
No. 1027

Commonwealth

vs.

Nicholas Romeo

ORDER FOR COMMITMENT

This 11th day of June 1974 [In] consideration of DR. RICHARD LIMOGES (Reports, Testimony, Etc. Attached) court finds NICHOLAS ROMEO

☐ Mentally Ill
[×] Mentally Retarded

Accordingly the Court Directs That NICHOLAS ROMEO (Patient's Name) [be] committed to PENNHURST STATE SCHOOL & HOSPITAL (Name of Facility) for:

☐ Inpatient Care

☐ Partial Hospitalization (Not applicable under Sections 408, 410 and 411)

☐ Outpatient Care (Not applicable under Sections 408, 410 and 411)

[for] mentally disabled person for a period not to exceed (If Designated Period Required)

[pur]suant to the Provisions of Section 406 of the Mental Health and Mental Retardation Act of 1966.

BY THE COURT
Hirsh
J.

10,434

DEFENDANTS' EXHIBIT NO. 6

(ORDER FOR COMMITMENT OF NICHOLAS ROMEO)

[Illegible Notation]
9

PART IX

THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

June Term, 1974

No. 1027

Commonwealth

vs.

Nicholas Romeo

ORDER FOR COMMITMENT

This 11th Day of June 1974 [In] Consideration of DR. RICHARD LIMOGES (Reports, Testimony, Etc. Attached) Court Finds NICHOLAS ROMEO

☐ Mentally Ill

[×] Mentally Retarded

Accordingly the court directs that NICHOLAS ROMEO (Patient's Name) [be] committed to PENNHURST STATE SCHOOL & HOSPITAL (Name of Facility) For:

☐ Inpatient Care

☐ Partial Hospitalization (Not applicable under Sections 408, 410 and 411)

☐ Outpatient Care (Not applicable under Sections 408, 410 and 411)

[for] mentally disabled person for a period not to exceed (If Designated Period Required)

[pur]suant to the Provisions of Section 406 of the Mental Health and Mental Retardation Act of 1966.

BY THE COURT
Hirsh
J.

V.

DEFENDANTS' REQUESTS

IN THE UNITED STATES DISTRICT COURT FOR EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-3429

Nicholas Romeo,

Plaintiff

v.

Duane Youngberg, et al.,

Defendants

DEFENDANTS' REQUESTED JURY INSTRUCTIONS

Defendants hereby request that the following instructions be given to the Jury. The requested instructions are attached hereto. Defendants request the Court's leave to supplement this request as justice may require.

(s) Joseph W. McGuire
Joseph W. McGuire
Deputy Attorney General
Jonathan Wheeler, Esquire
Attorneys for Defendants

Defendants' Jury Instruction No. 1:

Our constitution guarantees all of us the right not to be deprived of our liberty without due process of law. In evaluating the evidence in this case, you are entitled to presume that all citizens including the defendants fully obey the law until the evidence has convinced you otherwise.

Authority: Fourteenth Amendment, U.S. Constitution

Defendants' Jury Instruction No. 2:

All testimony of an admitted perjurer shall always be considered with caution and weighed with great care.

Authority: III Wigmore, *Evidence* §959 (3d Edition 1940)

Defendants' Jury Instruction No. 3:

A witness may be discredited or impeached by contradictory evidence, or by evidence that at some other time he or she had said or done something, or had failed to do or say something which is inconsistent with the witness' present testimony. If you believe any witness had been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

Authority: III Wigmore, *Evidence* §1008 (3d Edition 1940)

Defendants' Jury Instruction No. 4:

Evidence as to any oral admissions claimed to have been made outside the court by any party should be considered with caution and weighed with great care. The person making such an admission might have been mis-

taken or might not have clearly expressed his or her meaning. By the same token, the witness testifying to his or her alleged admission may have misunderstood or may have misquoted what was actually said. However, when an oral admission made outside the court is proved by the evidence, such an admission may be treated as trustworthy and should be considered along with all other evidence in the case.

Authority: IV Wigmore, *Evidence* §1056 (3d Cir. 1940)

Defendants' Jury Instruction No. 5:

Each party has introduced into evidence certain Interrogatories, which are questions together with answers signed and sworn to by the other party. A party is bound by his or her sworn answers. By introducing an opposing party's answers to Interrogatories, however, a party does not bind himself to these answers and he may challenge them in whole or in part or may offer contrary evidence.

Authority: Rule 33, Federal Rules of Civil Procedure

Defendants' Jury Instruction No. 6:

Damages must be reasonable. If you should find that the plaintiff is entitled to a verdict, you may award him only such damages as will reasonably compensate him for such injury and damage as you find, from a preponderance of the evidence in the case, that he has sustained as a proximate result of defendants' conduct. You are not permitted to award speculative damages. Consequently, you may not include in any verdict compensation for any prospective loss, although possible, if not reasonably certain to occur in the future.

Defendants' Jury Instruction No. 7:

With respect to plaintiff's claim for money damages you must return a verdict for the defendants unless each of them had acted with such impermissible motivation or with such disregard for the plaintiff's clear established constitutional rights that his or her actions could not reasonably be characterized as being in good faith.

Authority: *Hendricks v. McCune*, 434 F. Supp. 1038 (E.D. Va. quoting *Wood v. Strickland*, 420 U.S. 308, 322 1975)

Defendants' Jury Instruction No. 8:

In considering any potential liability of the defendants, you must take into account that under the law, the defendants are not liable to plaintiff for his emotional distress.

Authority: *Brainerd v. Potratz*, 421 S. Supp. 836; *Dear v. Rathje*, 391 F. Supp. 1, 9 (N.D. Il. 1975); *Robinson v. McCorkle*, 462 F.2d 111 (3d Cir. 1972)

Defendants' Jury Instruction No. 9:

Even though there are three defendants in this action, it does not flow from that fact alone that if one is liable all are liable. Each defendant is entitled to a fair consideration of his case and should not be prejudiced by your possible finding against another. If you find, based on the evidence, that Nicholas Romeo's civil rights were violated, you must determine if each of the defendants violated Romeo's civil rights. If you conclude that any defendant violated Nicholas Romeo's rights, that alone does not mean that the two others are also liable.

Defendants' Jury Instruction No. 10:

If you find that the plaintiff is entitled to a verdict in accordance with these instructions, but do not find that he has sustained substantial actual damages, you may return a verdict for the plaintiff in the nominal sum of $1.00.

Defendants' Jury Instruction No. 11:

The burden is on the plaintiff in a civil action such as this to prove the necessary elements of his claim by a preponderance of the evidence. If he fails to establish any essential element of his claim by a preponderance of the evidence, you should find for the defendant.

Establishing something by a preponderance of the evidence means proving that something is more likely so than not so. In other words, a preponderance of the evidence in this case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your mind the belief that what is sought to be proved is more likely to be true than not true.

In making your determination as to whether any fact in issue has been proved by a preponderance of the evidence, you may consider the testimony of all witnesses, unless instructed otherwise, regardless of which party called them and any exhibits received in evidence regardless of who produced them.

Authority: *Porter v. Atlantic and Gulf Stevedores, Inc.*, 387 F.2d 409 (3d Cir. 1968)

Defendants' Jury Instruction No. 12:

In evaluating the evidence and in determining whether any of the defendants have violated Nicholas Romeo's

civil rights, the fact that Nicholas Romeo was injured on any occasion, regardless of how many times he was injured, does not means that the defendants caused that injury or that they violated his civil rights.

Defendants' Jury Instruction No. 13:

The mere fact that Nicholas Romeo was injured on one or more occasions does not permit you to draw the inference that the injury or injuries were caused by any of the defendants or that any of the defendants was deliberately indifferent.

Defendants' Jury Instruction No. 14:

If you find, based on the evidence in this case, that Nicholas Romeo has been kept at Pennhurst by each of defendants against his will or against the will of his representative, Paula Romeo, he is entitled to some reasonable treatment with respect to his mental condition. However, if you find, based on the evidence, that Nicholas Romeo has not been confined at Pennhurst against his will or the will of his mother, none of the defendants owed plaintiff any constitutional duty to provide treatment.

In determining whether plaintiff has been confined against his or his mother's will, you may take into account any request that plaintiff or his representative made to any of the defendants to release Nicholas Romeo from Pennhurst.

Authority: *United States v. Jackson*, 553 F.2d 109 (D.C. Cir. 1976); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1967)

Defendants' Jury Instruction No. 15:

In order to show that the treatment of Nicholas Romeo was adequate under the Constitution, the defend-

ants need not show that the treatment would cure or improve Nicholas' condition but only that they made a bona fide effort to do so. A treatment program, including treatment of the mentally retarded in residential groups, does not violate the Constitution merely because it has a negative therapeutic effect or because it has other undersirable side effects.

Authority: *U.S. v. Jackson*, 553 F.2d 109 (D.C. Cir. 1976); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1967)

Defendants' Jury Instruction No. 16:

If based on the evidence in this case, you find that the defendants or any of them violated plaintiff's civil rights, you must then consider whether or not they are entitled to immunity because they acted in good faith. "Good faith" means a reasonable reliance on the existing procedures and a reasonable belief in their validity at the time. Immunity means that they are not liable, even if you have found that they have violated the plaintiff's civil rights.

Under the law, the defendants are entitled to immunity if (1) they did not know, nor should they have known, that the action which they took within the sphere of their official responsibility (2) would violate Nicholas Romeo's clearly established constitutional rights and (3) if they did not act with the malicious intent to cause the deprivation of his civil rights.

In making this determination, you must consider whether the state of the law at that time clearly established plaintiff's constitutional rights to be free from the actions of the defendants. The defendants are not lawyers

and have no duty to predict or anticipate changes in the law. If, the state of the law was in doubt, then you must find for the defendants.

Authority: *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975); *Wood v. Strickland*, 420 U.S. 308, 322 (1975) *U.S. ex rel. Bracey v. Rundel*, 368 F. Supp. 1186 (E.D. Pa. 1973)

Defendants' Jury Instruction No. 17:

In considering the evidence in this case, you must remember that a mentally retarded patient has the same constitutional rights as all citizens. Under the law, the defendants cannot be held liable for the deprivation of any of plaintiff's civil rights unless this deprivation was intentional. They cannot be held responsible for the act of their subordinates unless you conclude that: (1) each defendant had personal knowledge or reason to know that their subordinates were violating Nicholas Romeo's civil rights; (2) had authority and opportunity to intervene; (3) failed to do so. Your verdict must be in favor of defendants unless you find, based on the evidence, that they personally acted or failed to intervene so as to deny Nicholas Romeo's rights. However, if you find that the defendants did not personally act or fail to intervene resulting in a violation of Nicholas Romeo's constitutional rights, then even if some other person who was not a party violated plaintiff's rights, you must return a verdict for the defendants and against the plaintiff.

Authority: *Rizzo v. Goode*, 433 U.S. 362 (1976); *Lewis v. Hyland*, 534 F.2d 93 (3d Cir. 1977); *Flesch v. Eastern Pennsylvania Psychiatric Institute*, 434 F. Supp.

963, 979 (E.D. Pa. 1977); *Howell v. Cataldi*, 464 F.2d 272, 279 (3d Cir. 1972); *Halderman v. Pennhurst*, Civil Action No. 74-1345 (E.D. Pa. December 23, 1977)

Defendants' Jury Instruction No. 18:

You may not conclude that the defendants violated Nicholas Romeo's civil rights merely because you may conclude that Donnie James struck Nicholas Romeo in the shower.

VI.

COURT'S RULINGS ON POINTS FOR CHARGE

* * * *

(7-88)

THE COURT: Let's proceed to the points for charge. I will take the plaintiff's first.

No. 1 will be affirmed.

No. 2 is affirmed.

No. 3 is affirmed.

No. 4 is affirmed.

No. 5 is affirmed.

Some of these that I am affirming I may not use your language, but the points you raise will be covered.

No. 6 is affirmed.

No. 7 is affirmed.

No. 8 is affirmed.

No. 9 is affirmed.

No. 10 is affirmed.

No. 11 is affirmed.

No. 12 is affirmed.

(7-89) No. 13—

MR. McGUIRE: Your Honor, we object to this Charge.

THE COURT: It is not a violation of the Eighth Amendment to fail to provide plaintiff with treatment. It is a violation of the Eighth Amendment if there is a deliberate indifference to the serious medical and psychological needs of the patient.

I will make that modification in No. 13, if plaintiff will accept it.

I am talking about the second sentence.

MR. TRIYAK: The second sentence?

THE Court: Yes.

MR. TRIYAK: Would Your Honor have—

THE COURT: I am using the language of Estelle versus Gamble. It says if you find the defendants have failed to provide plaintiff with such treatment.

The Eighth Amendment does not require such treatment. The Eighth Amendment does require that you not be indifferent to the medical or psychological needs of the patient.

MR. McGUIRE: Your Honor, if I may speak further to this, if the Court intends to apply Estelle versus Gamble, I would say the first sentence of this charge is somewhat misleading.

It states there is a duty on the part of the de- (7-90)
fendants to provide this very kind of training.

It would seem to be contradictory to say in the first sentence the duty exists and in the second sentence to say it does not. Therefore, we would request the entire charge be thrown out.

Furthermore, the record is entirely clear the plaintiff is not being held against his will.

MR. TIRYAK: We are not going to argue the evidence at this time, it seems to me, Your Honor.

The purpose of the instruction has to do with the question of the purpose of commitment of a mentally-ill person.

As I stated before, he is not committed for any purpose other than to provide him treatment. He could not be involuntarily confined there at a mental institution for any other reason than to give him treatment. It has to do with his personal liberty, and that goes to the O'Connor versus Donaldson case, which the Supreme Court decided, and which the court said they could not keep a resident at a mental institution unless they provided him treatment.

MR. McGUIRE: Your Honor, the unrebutted evidence in this case—

MR. WHEELER: Your Honor, this request for charge goes much further. It says with such treatment as will afford him a reasonable opportunity.

That is directed to quality and kind of treat- (7-91)
ment. That is not what the Donaldson case says.

MR. TRIYAK: Your Honor, that language was taken from Judge Broderick's decision with respect to the duties owed by the officials at Pennhurst to the residents.

MR. McGUIRE: Your Honor, even if Judge Broderick's language is used, it is clear that language doesn't apply to the defendants in their individual capacities.

To be sure, Pennhurst may have that duty. However, Pennhurst is not on trial.

THE COURT: I think we have to try to zero in on these individual defendants, not the school itself.

MR. McGUIRE: These defendants, as individuals, owe nothing to Nicholas Romeo. Pennhurst owes a duty to him in some fashion.

Whether that duty is being carried out by Pennhurst, is not the subject of this litigation.

MR. ROMEO: Your Honor, the state has chosen these individuals.

THE COURT: The state is not a defendant here.

MR. TRIYAK: I understand that, but they have been delegated as state public officials.

THE COURT: Yes, but they are being sued in their individual capacity for violating the constitutional rights of this plaintiff.

MR. TRIYAK: That's correct, Your Honor.

(7-92) THE COURT: They are not being sued because they failed to give him care. They are being sued because they violated his constitutional rights.

MR. TRIYAK: Your Honor, if a police officer were to assault someone unjustifiably, one could recover damages against him under—

THE COURT: Individually. You can't recover against the City, though.

MR. TRIYAK: Correct, but even though he is acting as a public official, if you could show he was misusing the authority given to him—

THE COURT: Right, you have to show he was acting under color of law.

MR. TRIYAK: That's correct.

MR. McGUIRE: But, Your Honor, the distinction between that situation and the one before this Court is that it has already been conceded these defendants have done nothing personally to violate Nicholas Romeo's civil rights.

THE COURT: If they concede that, I would have to grant your motion.

MR. TRIYAK: That is not conceded.

MR. McGUIRE: We would submit the policeman illustration is entirely different. The policeman, as a public employee, is not entitled to step out to enjoy the protection of the state while he goes about battering citizens.

(7-93) THE COURT: I will use the language of Estelle versus Gamble which says if you find the defendants were deliberately indifferent to the medical and psycological needs of Nicholas Romeo, then you may find the plaintiff's Eighth Amendment rights were violated.

As modified, that is 13.

No. 14 is denied. As I have stated again and again, this is not a malpractice suit.

It makes no difference that somebody else would have done it differently.

No. 15 will be affirmed.

No. 16 affirmed.

Well, some of these we won't get into them until we get to the point of damages.

16 is a damage charge, am I correct?

MR. TIRYAK: Your Honor, the purpose of 16 is to let the jury be aware of an earlier instruction which said they had to find color of state law, injury and proximate cause to find liability. It is the earlier one.

This just explicates the language Your Honor already stated you were going to use in an earlier instruction explaining proximate cause, 4, Your Honor, Instruction 4.

THE COURT: Why don't you put it together, so I will understand it.

MR. McGUIRE: Your Honor, we will submit that (7-94) this addendum to the earlier charge simply adds confusion to the minds of the jury.

THE COURT: I guess he just wants a definition of proximate cause.

Is that what you want?

MR. TRIYAK: Yes, so the jury will understand.

MR. WHEELER: I am sure Your Honor is going to charge on proximate cause.

THE COURT: All right, so you don't have any objection. I would just add 16 after 4.

17 is affirmed.

18 will be affirmed.

MR. TRIYAK: It would seem to me 19 would be inappropriate.

MR. PLATT: We can withdraw that on this state of a record, Your Honor.

THE COURT: We will mark it withdrawn.

20 is affirmed.

21 is kind of like a repetition of 17 on the duties of the jury or the guidelines which the jury should have in deciding the credibility issue.

That is a standard Devitt and Blackmore charge. Take your choice, 17 or 21.

Well, I will cover credibility. I don't think it makes much difference which one I use.

(7-95) 22 will be affirmed.

23 will be covered.

I will charge them on credibility, they can take into consideration the bias or prejudice of the witness.

MR. TIRYAK: Your Honor, just to clarify, am I correct you are going to incorporate 23 in another charge?

THE COURT: It is covered in one of your previous charges. I tell the jury—I think it is in your 21. "Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case."

MR. TRIYAK: Would Your Honor include the language in there?

THE COURT: No, that is argument. You want me to make your argument. So I am not going to use your language. I am talking about 23.

MR. McGUIRE: 23 is refused?

THE COURT: Do you have any objection to their statement of their defense?

MR. WHEELER: Which one is that, sir?

THE COURT: No. 24.

MR. McGUIRE: Your Honor, I think there is no need to state argumentatively what the defendants claim.

(7-96) The language should be if the defendants acted in good faith they are immune and are not liable, not merely that they contend that.

This suggests a good-faith defense is something other than the law.

THE COURT: That is made clear in the following paragraph.

"In considering defendants' 'good-faith' defense, you are instructed . . . ," and so forth.

All right, the burden of proof on the defense is on the defendant. No problem with that. That was 25. That will be affirmed.

The remaining charges, I believe, have to do with damages which we don't have to discuss at this point.

MR. TRIYAK: Yes, Your Honor.

THE COURT: All right.

Now, the Defendants' No. 1 is denied.

2 is denied. I don't think anybody is convicted of perjury who is involved in this lawsuit.

No. 3, that will be affirmed. That is going to be covered.

MR. PLATT: One thing on that. Unless it is already included, the end of the first sentence that if a witness had failed to do or say something which is inconsistent with the witness's present testimony, that is objected to.

(7-97) THE COURT: No, that is a standard charge. He may be impeached by his own testimony or by the fact he failed to do something or did something which is not consistent with his present testimony.

That is impeachment.

4. I don't know what you are referring to here in No. 4 under reference to oral admissions.

MR. McGUIRE: Your Honor, we are particularly referring to statements and documents for Nicholas Romeo's commitments which were attested to or signed to by Mrs. Romeo.

THE COURT: Then you don't want No. 4. Why are you putting No. 4 in?

MR. McGUIRE: In that case, we will withdraw it, Your Honor.

THE COURT: No. 5 will be covered.

MR. PLATT: One thing on that. The last part there is not in Rule 33, by introducing an opposing party's answers the party is not bound.

The party whose responses are read into the record is bound.

THE COURT: By introducing opposing party's answers to interrogatories.

MR. PLATT: As long as it is clear the person who responded is bound—

THE COURT: By introducing an opposing party's (7-98) answers to interrogatories a party does not bind himself to these answers and he may challenge them in whole or in part or may offer contrary evidence.

MR. PLATT: We were the only ones who did that, I think.

THE COURT: Didn't you offer something?

MR. McGUIRE: We only made reference in the course of Mrs. Romeo's testimony to an answer she had supplied to the defendants' First Set of Interrogatories.

THE COURT: No. 6 has to do with damages.

No. 7 has to do with damages.

No. 8 has to do with damages.

9, I will change that and say if you conclude that one defendant violated Nicholas Romeo's rights, that alone does not mean that the other two—

MR. PLATT: Yes, that seems appropriate.

MR. McGUIRE: There is a typographical error there, Your Honor.

THE COURT: All right.

So that, as modified, will be affirmed.

10 refers to damages.

Burden of proof will be covered. It will be affirmed.

MR. PLATT: Can that be clarified, Your Honor?

THE COURT: What?

(7-99) MR. PLATT: The defendants may nevertheless have created the environment to cause his injuries.

THE COURT: Are you talking about No. 12?

MR. PLATT: Yes, sir.

THE COURT: No. The mere fact of injury does not mean there is a violation of his constitutional rights. That's all they are asking me to say there.

MR. PLATT: The problem is they say regardless of how many times he was injured, and one of the things this case is about, given the substantial number of injuries, you could find the environment created and maintained by the defendants was illegal and violative of his rights.

THE COURT: The mere fact of injuries does not prove a violation of constitutional rights. What you need is deliberate indifference.

MR. PLATT: That's why I asked Your Honor to modify it.

THE COURT: As stated, it is a correct statement of law, so I will affirm it.

No. 13 is the same thing in a sense as we were just discussing, so that will be affirmed.

No. 14, well, I don't know whether the fact there was a request for his release or weren't requests for his release has anything to do with the violation of his constitutional rights.

(7-100) I am talking about 14.

MR. McGUIRE: In determining whether or not a patient is entitled to treatment of any kind, whether it is a prisoner or a mental patient, the necessary predicate is he be confined against his will.

A person who has never asked to be released can not in any equitable sense be said to be held against his will.

I think the jury has to consider the fact Mrs. Romeo decried the environment at Pennhurst she never took any steps—

THE COURT: She took him home for three weeks and delivered him back into the hands of these people.

MR. McGUIRE: Your Honor, I think the jury is entitled to consider the fact—

THE COURT: You can argue that, but I am not going to make your arguments in the charge.

You can argue she took him home for three weeks and took him back.

MR. McGUIRE: The reason why we included this in here is that any constitutional duty, such as reasonable care or reasonable protection flows from the fact or not that he is being held against his will.

If he is not being held against his will, none of these constitutional rights arise.

THE COURT: I don't know that would be necessari (7-101) ly accurate here in view of the fact he is in there on a court commitment.

MR. PLATT: An involuntary commitment, Your Honor.

THE COURT: It has to be involuntary because he, himself, doesn't have the brains.

MR. PLATT: He doesn't have any will.

THE COURT: I am going to deny 14.

15 will be affirmed.

No. 16 will be affirmed.

MR. TIRYAK: Your Honor, one point with respect to 16.

THE COURT: Yes.

MR. TIRYAK: The Wood v. Strickland test, is inaccurate, at least with respect to the portion after 3.

The language of the Supreme Court in that case stated that if there is a malicious intent you don't need to show a violation of civil rights.

It says civil rights or other injury.

MR. McGUIRE: I think Mr. Tiryak's statement as to our interpretation of Wood versus Strickland is a little bit misleading.

The Supreme Court in Wood versus Strickland clearly associated any maliciousness on the part of a public official defendant with the acts for which he is being sued.

(7-102) Now, it doesn't make any sense if, for instance, on one cloudy day somewhere an ill-advised comment was made. That maliciousness might be entirely separate from the matter of treating Nicholas Romeo. It can't somehow be construed into an (inaudible).

Whatever malice the plaintiff may have established must be something that is associated with Mr. Romeo's constitutional rights.

MR. TIRYAK: Your Honor, the Supreme Court took the trouble of writing down specific words.

THE COURT: Suppose I look at Wood and Strickland and I will accept the Supreme Court's language.

MR. TIRYAK: Yes, with one other point with respect to 16.

Your Honor, the last sentence: "If the state of the law was in doubt, then you must find for the defendants."

First of all, there was no evidence the state of law was in doubt; secondly, as a statement of law it is not correct.

The state of the law was absolutely clear with respect to the duties owed to my client at that time.

THE COURT: I think I understand what you are trying to say. It might be a little inarticulate.

In making this determination you may consider the defendants' knowledge of the law, whether or not the state of (7-103) the law was clear.

Is that what you are trying to say?

MR. McGUIRE: That is not correct, Your Honor.

MR. PLATT: That is not the law. The law is what they knew or should have known.

THE COURT: I didn't say knew or should have known. I say they knew or should have known, but that is a factor they may take into consideration what they believed the state of the law was.

MR. PLATT: Again there was no evidence that anyone believed the state of the law was in doubt.

MR. McGUIRE: Your Honor, I didn't have each and every one of the defendants testify as to his understanding.

THE COURT: To tell you the truth, it is not too clear to me right now what the state of the law is.

The only thing I can do is judge by Estelle versus Gamble, which is the most recent Supreme Court pronouncement on an involuntarily-confined person in receiving the proper treatment.

They say deliberate indifference to the serious medical needs.

How about if I substitute in, in making this determination you may consider the defendants' understanding of the law as it existed during the time in question?

MR. McGUIRE: We have no objection to that, Your (7-104) Honor.

MR. TIRYAK: We will request the statement be made whether they reasonably should have known.

THE COURT: I am going to include the Wood versus Strickland language and also this.

All right, 17, do you have any objection to 17?

MR. PLATT: Yes, Your Honor. There is authority that there can be vicarious liability in civil-rights actions. We would object to that part of it that says there can not.

MR. McGUIRE: Your Honor, we would respond by referring the Court to the trial brief in which I believe we have outlined the law from the Supreme Court—

THE COURT: Only if they had knowledge of the violation by other people, and I thought that was the whole theory of your case, and took no action to correct it.

You gave an example of the police lieutenant standing and watching his man beat up on one of the prisoners.

MR. McGUIRE: If the Court please, I would remind the Court both of these cases long precede Rizzo versus Goode and its progeny in this Circuit and the effect of Rizzo is most compelling.

The Third Circuit has reaffirmed Rizzo in a recent case actually involving the state police and state police supervisory officials in New Jersey.

Strike that, I don't recall whether it was New (7-105) Jersey or Pennsylvania.

THE COURT: New Jersey. The Turnpike case.

MR. McGUIRE: That's right.

THE COURT: They stopped all people with long hair.

MR. McGUIRE: That's it, Your Honor. The Third Circuit made it abundantly clear even though what might have been taking place to these individual citizens was a violation of their rights, that the supervisory officials who might have been involved in this or who actually knew what was going on, they were not people who could be said to have been violating the plaintiffs' civil rights.

The mere knowledge under Rizzo and under Lewis does not amount to participation such as to make the defendant liable.

THE COURT: Mere knowledge is not enough, but mere knowledge would be authority and duty to act may well be.

I think if you would submit a point that said that these defendants are not liable for what somebody else did unless they had knowledge of those things, that what they did was wrong, and they had the authority and power to act, and I think in that situation I agree on your basic proposition that there is no vicarious liability or respondeat superior, that is, the mere fact that a subordinate committed a violation of the constitutional rights is not enough to convict these defendants (7-106) of a violation of constitutional rights.

MR. McGUIRE: And we are talking about one instance of that in this case.

THE COURT: That certainly couldn't go to the jury on that one instance because—

MR. McGUIRE: Well, that is the solitary act of a subordinate that is involved here.

MR. PLATT: There were also omissions involved here as well.

THE COURT: They certainly could not, even if they believed that, even if the jury were to believe he was assaulted by that mental-retardation aide, you could not posit liability on that because there has been no evidence even that they knew that M. R. A. aide assaulted Nicholas before or anything else.

It is as if my secretary would go out and drive her car and hit somebody crossing the street. It doesn't make me liable.

MR. PLATT: There are cases in this District that do hold vicarious liability even for that single act.

THE COURT: Not for that act. Only in the event they had knowledge of it, just like you say in one of your points, that they knew or should have known.

MR. PLATT: That is basically the totality of the circumstances. As to the one assault, though, I think there is (7-107) authority that would permit vicarious liability.

THE COURT: No, absolutely not, not under these circumstances, not unless they were present and could have observed it.

MR. TRIYAK: Your Honor, may I point out one other thing that Lori Lewis testified to?

Lori Lewis did not testify—she testified there was one physical striking with the fist, but she also testified to

the fact that her observation was that Donnie James had threatened Nicholas Romeo with a mop handle.

THE COURT: There was one event which was not brought to the attention of the people at Pennhurst until some months later.

I don't see how you can relate back a violation of constitutional rights because of that one incident.

You certainly can't impute knowledge to them that they were going to do it or that they were there.

I don't think you can impute knowledge of something that happened four months before they were even told about it.

MR. McGUIRE: If the Court please, can we have a charge to the jury on that particular incident?

THE COURT: That even if they find the mere fact that Donnie James struck him, even if they find that he struck him that that is not sufficient to convict them?

(7-108) MR. McGUIRE: That is correct, Your Honor.

THE COURT: If you write something down for me and let me look at it, I will consider it.

MR. McGUIRE: Thank you, Your Honor.

THE COURT: Because I don't see how you can posit liability on that factor alone.

MR. McGUIRE: Your Honor, along with the personal liability lines this court most recently dealt with this in another case involving Pennhurst, that is Judge Broderick in his opinion made it abundantly clear that absent personal participation in this very wrongdoing—and I will

remind the Court the wrongdoing there involved the failure to protect patients from harm, the very kind that is at issue here, and the failure to treat in the least restrictive alternative.

The court held the individual defendants were not liable for that. They didn't cause that situation. They didn't continue its existence, and the existence of those violations was not attributable to them.

Now, those are the same facts that are here and we suggest the court's decision in Halderman ought to be decided along those lines.

THE COURT: It seems to me even if in Halderman Judge Broderick found there was a constitutional violation there obviously was vicarious responsibility because they were subordinates.

(7-109) MR. McGUIRE: And specifically the judge held there could be no vicarious responsibility. The failure was that of the state in terms of appropriate funding.

THE COURT: I will just deny this No. 17 as stated. You can submit something else, something to the effect the mere fact somebody else violated this plaintiff's constitutional rights does not mean that these defendants are responsible for it.

* * *

VII.

CHARGE TO THE JURY

(8-3) (Now, 9:45 a.m., Wednesday, April 26, 1978, trial resumes in the presence of the jury.)

CHARGE OF THE COURT

McGLYNN, J.:

Good morning, ladies and gentlemen.

THE JURY: Good morning.

THE COURT: Well, we are at that stage of the trial where I am going to discharge my responsibility and instruct you as to the law which governs this case, and then it will be up to you.

So that you will have in mind what your ultimate objective here is I want to tell you now that when you return after your deliberations you will be asked whether you find for the plaintiff or for the defendant and we will ask you as to each individual defendant. So the question will be asked do you find for the plaintiff or do you find for the defendant, Youngberg, or do you find for the plaintiff or do you find for the defendant, Matthew, do you find for the plaintiff or do you find for the defendant, Conly, and then you will respond to each of those questions.

(8-4) During the course of my instructions I may refer to the evidence in the case and, when I do so, I am giving you my recollection of the evidence and, if my rec-

ollection of the evidence is not consistent with your recollection of the evidence, then, of course, your recollection prevails, not mine.

You are the jurors. You are the finders of fact. I am only the instructor as to the law.

It is your duty, as jurors, to follow the law as stated by me and to apply these rules to the facts as you find them.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

You are not to be concerned with the wisdom of any rule of law stated by me. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your duty to base a verdict upon any other view of the law than that given in these instructions.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts on the same evidence presented to all the jurors and to arrive at a verdict by applying the same rules of law.

(8-5) You are to perform your duty without bias or prejudice as to any party. Our system of law does not permit jurors to be governed by sympathy, prejudice or public opinion. Both the parties and the public expect you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court and reach a just verdict regardless of the consequences.

You should consider each instruction given to apply separately and individually to each of the defendants in the case.

Ladies and gentlemen, this is an action for damages filed by the plaintiff, Nicholas Romeo, against these three individuals for allegedly permitting or acquiescing in the beating of the plaintiff by patients or staff while he was confined at the Pennhurst State School and Hospital.

The plaintiff also alleges that these individuals are liable to him because they sought to punish him for filing this action by shackling him to his bed unnecessarily for long periods of time each day and denying him programs and treatment otherwise available to patients at Pennhurst.

Even though there are three defendants in this action, it does not flow from that fact alone that if (8-6) one is liable all are liable. Each defendant is entitled to a fair consideration of his case and should not be prejudiced by your possible finding against one of the other defendants.

If you find based on the evidence in the case that Nicholas Romeo's civil rights were violated, you must determine if each of the defendants violated Romeo's civil rights.

If you conclude that one defendant violated Romeo's civil rights, that alone does not mean that the other two are also liable.

Of course, the defendants deny they violated the plaintiff's constitutional rights and they also contend that even if Nicholas Romeo's rights were violated, they acted in good faith and without knowledge that their conduct would violate Nicholas Romeo's civil rights and that they acted without malice or malicious intent to cause a deprivation of constitutional right or other injury.

The burden is on the plaintiff in a civil action such as this, to prove every essential element of his claim by a preponderance of the evidence.

If the proof should fail to establish any essential element of his claim by a preponderance of the evidence, the jury, of course, should find for the defendants.

(8-7) To establish by a preponderance of the evidence means to prove something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence that when considered and compared with that opposed to it has more convincing force and produces in your minds belief that what is sought to be proved is more likely true than not true.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received into evidence, regardless of who may have produced them.

Although the burden is on the party who asserts the affirmative of an issue to prove his claim by a preponderance of the evidence, this rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In a civil action, such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact if after consideration of all the evidence in the case the jury believes that what is sought to be proved on that issue is more likely true than not true.

You are to consider only the evidence in (8-8) the case, but in your consideration of the evidence you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testified. You are permitted to draw from facts which you find have been proved such reasonable in-

ferences as seem justified in the light of your own experience.

You are not bound to decide an issue of fact in accordance with the testimony of any number of witnesses which does not produce in your minds belief in the likelihood of truth as against the testimony of a lesser number of witnesses or other evidence which does produce such relief in your minds.

The test is not which side brings the greater number of witnesses or presents the greater quantity of evidence, but which witness and which evidence appeals to your minds as being most accurate and otherwise trustworthy.

Each party has introduced into evidence certain interrogatories, that is, questions together with answers signed and sworn to by the other party.

A party is bound by his sworn answers. By introducing an opposing party's answers to interrogatories, however, a party does not bind himself to these answers and he may challenge them in whole or in part or may offer (8-9) contrary evidence.

The means of knowledge are ordinarily the equivalent in law to knowledge. So, if it appears from the evidence in the case that a person had information which would lead a reasonably prudent person to make inquiry through which he would surely learn certain facts, then this person may be found to have had actual knowledge of those facts, the same as if he had made such inquiry and had actually learned such facts.

That is to say, the law will charge a person with notice or knowledge of whatever he would have learned, making such inquiry as it would have been reasonable to expect him to make under the circumstances.

Knowledge or notice may also be established by circumstantial evidence. If it appears that a certain condition has existed for a substantial period of time, and that the party had regular opportunities to observe the condition, then you may draw the inference that he had knowledge of the condition.

Ladies and gentlemen, you are the sole judges of the facts and as the judges of the facts you must determine which of the witnesses you believe, what portion of their testimony you accept and what weight you attach to it.

(8-10) At times during the trial I have sustained the objections to questions asked without permitting the witness to answer or, where an answer has been made, I have instructed that it be stricken from the record and that you disregard it and dismiss it from your mind.

You may not draw an inference from the unanswered questions nor may you consider testimony which has been stricken in reaching your decision. The law requires your decision be made solely upon the competent evidence before you.

Such items as I have excluded from your consideration will be excluded because they are not legally admissable.

The law does not require you to accept all the evidence that I have admitted, even though it be competent. In determining what evidence you will accept, you must make your own evaluation of the testimony given by each witness and determine the degree of weight you choose to give this testimony.

The testimony of a witness may fail to conform to the facts as they occurred because he is intentionally telling a

falsehood, because he did not accurately see or hear that about which he testifies, because his recollection of that event is faulty or because he has not expressed (8-11) himself clearly in giving his testimony. There is no magical formula by which one may evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives in everyday affairs. You determine for yourselves the reliability or unreliability of statements made to you by others. The same tests that you use in your everyday dealings are the tests which you apply in your deliberations.

The interest or lack of interest of any witness in the outcome of this case, the bias or prejudice of a witness, if there be any, the age, the appearance, the manner in which the witness gives his testimony on the stand, the opportunity that the witness had to observe the facts concerning which he testifies, the probability or improbability of the witness' testimony when viewed in the light of all of the other evidence in the case, are all items to be taken into your consideration in determining the weight, if any, you will assign to that witness' testimony.

If such considerations make it appear that there is a discrepancy in the evidence, you will have to consider whether the apparent discrepancy may not be reconciled by fitting the two stories together.

If, however, that is not possible, you will then have to determine which of the conflicting versions (8-12) you will accept.

You should carefully scrutinize all the testimony, the circumstances under which each witness has testified and every matter in evidence which tends to show whether the witness is worthy of belief.

Consider each witness' intelligence, motive and state of mind. Consider the witness' ability to observe the matters to which he has testified and whether he or she impresses you as having an accurate recollection of those matters.

Consider, also, any relation each witness may bear to either side of the case, the manner in which each witness might be affected by the verdict and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently and an innocent misrecollection, like a failure of recollection, is not an uncommon experience.

In weighing the effect of a discrepancy always consider whether it pertains to a matter of importance (8-13) or to an unimportant detail and whether the discrepancy results from an innocent error or an intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, as you think it deserves.

A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time a witness has said or done something or has failed to say or do something which is inconsistent with the witness' present testimony.

If you believe any witness has been impeached and, thus, discredited, it is your exclusive province to give the

testimony of that witness such credibility, if any, as you think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars and you may reject all the testimony of that witness or give it such credibility as you think it deserves.

The plaintiff bases his claim upon a law passed by Congress which is Section 1983 of the United States Code, Title 42.

This provides that any person may file a (8-14) suit against and recover damage from any person who acting under color of law knowingly deprived the plaintiff of the rights under the Constitution.

In order to prove his claim the plaintiff has the burden to establish by the preponderance of the evidence in the case, first, that the defendant was acting under color of state law, and I don't think there is any dispute to that here. The three individuals were state employees and acting under the authority granted to them by the state.

Secondly, the plaintiff must prove that the defendants intentionally deprived the plaintiff of rights secured by the 8th and 14th Amendments to the United States Constitution.

Thirdly, the defendants' acts or failure to act were the proximate cause of injury and damage to the plaintiff.

An injury or damage is proximately caused by an act or failure to act whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage

and that the injury or damage was either the direct result or reasonably probable consequence of that act or admission.

I can give you an example in this case of (8-15) proximate cause. One of the allegations here is that Mr. Donnie James assaulted the plaintiff, Nicholas Romeo.

Even if you believe that is true, it is not likely that any of the acts of the defendants could have caused any injury as a result of that assault unless they were there and encouraged Mr. James to assault him or condoned his conduct in some other way.

Anything they did after it happened, however, could not be said to have been a cause of the injury to Nicholas Romeo.

As I indicated earlier, the defendants were acting under color of law if their actions were based on authority possessed by virtue of state law, that is, if the defendants were clothed with the authority of state law even if these actions were a misuse of authority.

You are hereby instructed that in this case the defendants were acting under color of state law, so you may regard this element of the plaintiff's case as having been proved.

It is not necessary to find that the defendants had any specific intent to deprive the plaintiff of his civil rights in order to find for the plaintiff. The plaintiff is entitled to relief if the defendants intended the actions or inaction which resulted in a violation (8-16) of plaintiff's rights.

Plaintiff asserts that his constitutional rights were violated by the defendants in four ways. He first contends that defendants' failure to provide him with a reasonable

degree of protection from repeated assaults by patients and staff at Pennhurst violates his rights under the 8th Amendment to the United States Constitution.

The 8th Amendment of the United States Constitution forbids the infliction of cruel and unusual punishment upon persons confined to institutions. The 8th Amendment specifically says excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishment inflicted.

Thus, if any or all of the defendants were aware of and failed to take all reasonable steps to prevent repeated attacks upon Nicholas Romeo, such failure to act deprived the plaintiff of rights guaranteed by the 8th Amendment.

Plaintiff, Romeo, also contends that his 8th Amendment right to be free from cruel and unusual punishment was violated after this lawsuit was filed by the defendants unnecessarily shackling him to his bed or chair and denying him the opportunity to participate in the same treatment and programs as other residents at (8-17) Pennhurst.

Plaintiff contends that defendant shackled him and denied him programs to punish him for filing this lawsuit.

If you find that any or all of the defendants shackled or caused Nicholas Romeo to be shackled to his bed or chair, or denied him programs as a punishment for filing this lawsuit, those acts deprived plaintiff of his rights guaranteed by the 8th Amendment.

On the other hand, if you find that these acts were taken by the defendants in a good faith effort to treat Nicholas Romeo's condition, then, of course, you should find for the defendants.

The plaintiff also contends that his rights under the 14th Amendment to the United States Constitution were violated by the defendants.

The 14th Amendment to the Constitution provides in relevant part that:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the (8-18) laws."

Under the 14th and 8th Amendments, state officials at a state mental hospital have a duty to protect involuntarily committed residents from repeated attacks by other patients and staff.

Plaintiff, Nicholas Romeo, contends that these defendants violated such a duty to protect him because they were aware of such attacks and failed to take such reasonable steps as required to protect him.

If you find that the defendants were deliberately indifferent to the medical and psychological needs of Nicholas Romeo, then you may find that plaintiff's 8th and 14th Amendment rights were violated.

Now, ladies and gentlemen, this case is not a malpractice case You are not to decide whether Nicholas could have been treated in some other fashion or whether it could have been done in some other way or better way. That is not the issue in this case.

The issue here is whether or not his rights were violated.

Malpractice, that is, the failure to properly treat somebody or negligently treat somebody, does not become a constitutional violation merely because the victim is committed to the custody of a state institution.

(8-19) In order to prove his case the plaintiff must show acts or omissions sufficiently harmful to evidence a deliberate indifference to the serious medical needs of the resident. It is only such indifferences that can offend the standards of decency required by the 8th Amendment.

To find for the plaintiff you need not find that the defendants personally participated in any attack upon the plaintiff. If you find that the defendants were aware of repeated attacks upon plaintiff and failed within their sphere of authority to take reasonable steps to protect the plaintiff, then you may find that the defendants are liable for a violation of the plaintiff's constitutional rights.

On the other hand, if you find that the defendants took all reasonable steps under the circumstances to protect Nicholas Romeo from harm, then you should find for the defendants.

In evaluating the evidence and in determining whether any of the defendants have violated Nicholas Romeo's civil rights, the fact that Nicholas Romeo was injured on occasion, regardless of how many times, does not mean that the defendants caused that injury or that they violated his civil rights.

The mere fact that Nicholas was injured on one or more occasions does not permit you to draw the infer-
(8-20) ence that the injury or injuries was caused by any of the defendants or that any of the defendants was deliberately indifferent.

In order to show that the treatment of Nicholas Romeo was adequate under the Constitution the defendants need not show that the treatment would cure or improve Nicholas' condition, but only that they made a good faith effort to do so.

The treatment program, including treatment of the mentally retarded in residential groups, does not violate the Constitution merely because it has a negative therapeutic effect or because it has other undesirable side effects.

The plaintiffs have to prove a violation of Mr. Romeo's constitutional rights. The defendants, of course, as I stated earlier, contend his rights were not violated, but they also contend that even if his rights were violated, the actions they took were taken in good faith and, therefore, under the law they are not liable.

If based on the evidence in this case you find that the defendants or any of them violated plaintiff's civil rights, you must then consider whether or not they are entitled to immunity because they acted in good faith.

Good faith means a reasonable reliance on (8-21) the existing procedures and a reasonable belief in their validity at that time.

Immunity means they are not liable even if you found they violated the plaintiff's civil rights.

Under the law the defendants are entitled to immunity unless they knew or should have known that the action which they took within the sphere of their official responsibility would violate Nicholas Romeo's established constitutional rights or if they acted with a malicious intent to cause a deprivation of his civil rights or other injuries.

In considering the evidence in this case you must remember that a mentally retarded patient has the same constitutional rights, but under the law the defendants cannot be held liable for the deprivation of any of plaintiff's civil rights unless they intended the acts which caused the violation of his civil rights, nor can they be held responsible for acts of their subordinates unless you conclude that each defendant had personal knowledge or reason to know that the subordinates were violating Nicholas Romeo's civil rights, had an opportunity to intervene or prevent such conduct and failed to do so.

However, if you find that the defendants did not personally act or fail to act which conduct resulted (8-22) in the violation of Nicholas Romeo's constitutional rights, then even if some other person who is not a party violated the plaintiff's rights, you must return a verdict for the defendants and against the plaintiff.

If you conclude from the evidence that Donnie James struck Nicholas Romeo in the shower, that fact, standing alone, is not sufficient to hold these defendants for violating Mr. Romeo's civil rights. In other words, the mere fact that someone else may have violated Mr. Romeo's civil rights, it does not necessarily follow that the defendants did so, even though he was a subordinate, as I explained to you earlier.

In order to establish this good faith defense each defendant has the burden to establish that by a preponderance of the evidence, that is, they must establish by a preponderance of the evidence that his or her actions or inactions were made in good faith.

Ladies and gentlemen, I am not going to review the evidence. I think counsel has presented their respective

positions to you ably and well and have reviewed the evidence for your benefit.

I have just given you the law which is applicable to this case and now it is your duty to deliberate and to return a verdict in accordance with the evidence and (8-23) the law which I just explained to you.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment.

You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors.

In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you are convinced it is erroneous, but do not surrender your honest convictions as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times you are not partisans. You are the judges. You are the judges of the facts and your sole interest is to seek the truth from the evidence in the case.

May I see counsel up here?

(8-24) (The following takes place at side bar out of hearing of the jury.)

THE COURT: Let me ask plaintiff, do you have any objections or exceptions or requests for clarification?

MR. TIRYAK: No.

THE COURT: How about the defendant?

MR. WHEELER: We would ask for a general exception, Your Honor.

THE COURT: You don't get a general exception.

MR. WHEELER: O.K., I don't have any specific exceptions.

MR. McGUIRE: Your Honor, I would enter an exception as to the charge of whether the defendants have the duty to take all reasonable steps, as distinguished from any reasonable steps. It is our view the law supports the notion that it would only be obligated to take reasonable steps and their failure to take all reasonable steps cannot impose liability on them.

THE COURT: It is semantics. When you say reasonable steps, it means—

MR. McGUIRE: Our view is whether they are obligated to take reasonable steps or whether they must (8-25) take all reasonable steps or simply any reasonable steps, and it is our view if they have taken any reasonable steps they have satisfied the duty owed to Nicholas Romeo.

THE COURT: All right.

(Side bar conference concluded and trial resumes in the presence of the jury.)

THE COURT: There are just two final housekeeping instructions. Number 1, you can only have 12 jurors deliberate, so that it would be Jurors 13 and 14, I will ask you to step down now and sit over there.

Then when you go out to begin your deliberations you will select from among yourselves a Foreman or Forelady and that person will preside in your deliberations, but his or her views, of course, are not entitled to any greater weight than the views of any other individual jurors.

(Marshal sworn.)

(Now, 10:20 a.m. jury leaves courtroom to deliberate.)

THE COURT: What about the alternates? If they reach the point of deliberating on damages, I don't think we can put the alternates back in the box?

MR. WHEELER: If they don't participate in (8-26) the deliberations on liability, I would agree with you.

I would have no objection to dismissing the alternates at this time.

MR. PLATT: Yes.

THE COURT: All right, we will just wait for the—don't go away. Don't go too far away. I will let you know when we are going to go to lunch so that you can act accordingly.

(Now, 10:22 a.m. court recesses.)

(Now, 2:13 p.m. jury returns to courtroom with question.)

THE COURT: Ladies and gentlemen, I have your communique and it reads as follows:

"Dear Sir:

"We, the jury, are having difficulty with all of us remembering the exact words of your charge. Is the point of law we are to decide based on the intentional deprivation of the plaintiff's civil rights or the loss of his rights regardless of intent?

"We would appreciate your clarification or restatement of this point."

THE COURT: I am going to respond in this way. Actually, the way your question is phrased, I don't (8-27) think it can be answered precisely.

It is really a three-step analysis. The first step is to determine whether or not the plaintiff's civil rights were violated, that is, whether under the circumstances his treatment was not in accordance with the standards of decency required by the Constitution.

If his treatment was in accordance with the standards of decency under the circumstances, then you should find for the defendants.

If it was not in accordance with the standards of decency, then you go on to the second step.

The second step is to determine whether any intentional act or intentional failure to act on the part of any or all of these defendants caused the violation to the plaintiff.

If you find that there was no intentional act or failure to act on their part which caused the violation, then you should find for the defendants.

If you find that there was an intentional act on their part or failure to act on their part which caused the violation of plaintiff's civil rights, then you proceed to the third step.

The third step is to determine whether or not these defendants were acting in good faith in the treatment (8-28) of this plaintiff and, therefore, if they were acting in good faith, they were immune unless they were acting maliciously or with specific intent to deprive him of his constitutional rights.

So try to remember it is a three-step analysis, whether or not his rights were violated, whether or not these defendants did any act or failed to act that caused that violation and, if those two things were yes, whether or not they were acting in good faith.

If you find in the final analysis they were acting in good faith, there, again, you should find for the defendants.

If they were not acting in good faith when you reach that point, then you find for the plaintiff. It is as simple as that.

You may be excused.

(Now, 2:17 P.M. jury retires to deliberate.)

(Now, 3:05 p.m. jury returns to courtroom with verdict.)

* * *

VIII.

JUDGMENT ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-3429

NICHOLAS ROMEO, an incompetent, by his motion and next friend, PAULA ROMEO

vs.

DUANE YOUNGBERG, Individually & in his official capacity as Superintendent, Pennhurst State School & Hospital; RICHARD MATTHEWS, Individually & in his official capacity as Director of Resident Life, Pennhurst State School & Hospital, and MARGUERITE CONLEY, Individually & in her official capacity as Unit Director, Unit 9, Pennhurst State School & Hospital

---

CIVIL JUDGMENT

Before Hon. Joseph L. McGlynn, Jr.

AND NOW, this 26th day of April, 1978, in accordance with the verdict of the jury,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of DUANE YOUNGBERG, RICHARD MATTHEWS and MARGUITE CONLEY, defendants, and against NICHOLAS ROMEO and PAULA ROMEO, Plaintiffs.

BY THE COURT:

ATTEST:

(s) Beverlee Bearman
BEVERLEE BEARMAN
Deputy Clerk